Filed 11/14/17 P. v. Ruelas CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALFONSO RUELAS, Defendant and Appellant.	H042776 (Santa Clara County Super. Ct. No. C1231089)

I. INTRODUCTION

A jury convicted defendant Jesus Alfonso Ruelas of first degree murder (Pen. Code, § 187, subd. (a))[1] and found true an allegation that he personally and intentionally discharged a firearm and proximately caused the death of Chanel Munoz (§ 12022.53, subds. (b), (c), & (d)) and an allegation that he committed the murder for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(5)). The trial court sentenced defendant to an indeterminate term of 25 years to life for the murder with a consecutive indeterminate term of 25 years to life for the section 12022.53, subdivision (d) allegation.

On appeal, defendant contends the trial court made three instructional errors: (1) giving an instruction on fabrication of evidence; (2) failing to instruct on involuntary manslaughter based on unconsciousness due to voluntary intoxication; (3) failing to

[1] All further statutory references are to the Penal Code.

instruct that the motive instruction did not apply to the gang allegation. Defendant also contends that the judgment must be conditionally reversed and remanded to the juvenile court for a transfer hearing in accordance with Proposition 57, the Public Safety and Rehabilitation Act of 2016. Finally, defendant contends that his sentence of 50 years to life constitutes cruel and unusual punishment.

For the reasons stated below, we find no merit to defendant's claims of trial court error with respect to jury instructions, nor to his claim that he is entitled to a transfer hearing under Proposition 57. And while we find no merit to defendant's cruel and unusual punishment claim, we do find that he is entitled to a limited remand so the trial court can determine whether defendant had an adequate opportunity to make an accurate record of his circumstances and characteristics at the time of his offense, in anticipation of a future youth offender parole hearing. We will therefore affirm the judgment and order a limited remand.

II. BACKGROUND

A. The Shooting

On February 28, 2010, Chanel Munoz went to a party with her friend Justina Acuna. At some point, Munoz and Acuna left the party to go for a walk. Munoz was wearing a 49ers shirt.

As they walked, Munoz and Acuna passed by a group of people who began following them and trying to talk to them. In order to get away, Munoz and Acuna went into a taqueria. However, when they left the taqueria about five minutes later, two males from the group were waiting for them.

The two males got in front of Munoz and Acuna, causing them to stop walking. The males were "saying stuff" to the women. One of the males twisted a cell phone out of Acuna's hand. Acuna and Munoz tried to get away from the males, but one of the males pulled out a gun and pointed it at Munoz. Acuna shouted Munoz's name, and the

male fired two or three gunshots at Munoz. Acuna wanted to run to Munoz, but the male pointed the gun at Acuna. Both males then "took off running." As they ran, they yelled out "VPLs" and "sur trece."

Acuna ran over to Munoz, who was on the ground. A passerby stopped and took both Munoz and Acuna to the hospital, where Munoz was pronounced dead. Munoz had two gunshot wounds: in her forehead and in her back.

At the hospital, Acuna worked with a police sketch artist to draw a sketch of the shooter. She described the shooter as being about five feet, six inches to five feet, seven inches tall. At the time, defendant was five feet, 11 inches tall and weighed 200 pounds.

In 2012, Acuna viewed a photographic lineup, which contained a photograph of defendant, but she did not pick out anyone "for sure." When she saw defendant at the preliminary hearing and at trial, he looked familiar, despite the fact that he had a different hairstyle and was wearing glasses. Defendant reminded Acuna of the shooter because of the shape of his head and the acne on his face. She identified a photograph of defendant taken a few weeks before the shooting, saying defendant looked similar to the shooter.

B. Defendant's Interviews and Telephone Calls

On April 24, 2012, defendant was in the Witness Relocation Program. He agreed to talk with investigators from the Santa Clara County District Attorney's Office.

Defendant admitted being present during the Munoz shooting, but he claimed that Hector Garcia—who was subsequently killed—had committed the shooting. Defendant said that he and Garcia had been "drunk, very drunk" after coming from a party hosted by another gang member. They walked towards the girls, one of whom was wearing a red shirt, and one of the girls looked at them. Garcia then began "talking shit." Munoz tried to slap Garcia, who then shot her with a .22-caliber gun. During the incident, Garcia said "Sur or Sur Tre[ce]," the name of a rival gang.

Later in the interview, defendant changed his story, saying that Garcia had been present but that fellow gang member Joseph Antuna was the shooter. Then, after being

shown the sketch of the shooter, defendant admitted he had shot Munoz. In response to a question about what happened, defendant said, "Oh it's just that we were drunk." He reiterated, "I was really drunk." He explained, "I was just drunk. I wasn't thinking about anything."

Defendant told the investigators that he had obtained the gun "from the gang." Asked again his reason for the shooting, defendant replied, "I don't know, it wasn't no reason. I think I shot her for myself and that's what it was. Sense of security. That was just me trying to prove myself to everybody and then that happened."

Defendant expressed concern that his family would be kicked off the Witness Relocation Program. He called his mother, telling her he was being arrested for a homicide and instructing her where to find his phone in his room. Defendant told the investigators that on the morning after the shooting, he had told his mother that he had "fucked up bad."

Defendant then called his father, explaining that he was being arrested because "we shot someone up." He said he did not want to "tell lies anymore" and expressed a hope that the police would help him. He instructed his father to retrieve his cell phone from a stove fixture in his room and to give the phone to "Junior."

Defendant later called his mother from jail. He first spoke to someone named Karla, telling her he was in jail because he "did something bad a long time ago." When asked why, defendant said, "Because I was dumb." When his mother later asked if defendant "did it," defendant responded, "Yes."

Defendant was interviewed a second time. During that interview, defendant said he had been "[h]eavily drinking" at a party and was "out of my mind drunk." He did not normally drink much, but he had been drinking "shot after shot."

After leaving the party, defendant and Garcia had followed Munoz and Acuna, trying to talk to them. Defendant then "kinda like blacked out" due to being so drunk.

He "wanted to prove [him]self" because he felt that he "wasn't accepted enough by the gang," so he shot Munoz.

Defendant described his location near the taqueria and the direction he was facing. He described the victims' clothing, recalling that Munoz was wearing a red 49ers sweatshirt and that Acuna was wearing a black top. He described his own clothing: a black and white Pendleton and a Pittsburgh Pirates' hat. He recalled that Garcia had been doing most of the talking and that David Fruitus was present during the incident. He remembered that Munoz was "getting aggressive" and saying things like, "Back the fuck up." He specified where he had carried the gun (inside his left pants leg) and that when he shot the gun, the first round did not fire. He described running to a friend's house after the shooting.

Defendant acknowledged being a fifth-generation member of the El Hoyo Palmas (a Norteño gang) and having the moniker Chuco. He admitted saying "Sur Trece" after the shooting—a reference to Sureños, rivals of Norteños—so that he would not get caught.

Defendant initially claimed he did not shoot at Munoz "with the intention of hitting anybody." He claimed he did not remember what was on his mind, explaining, "I don't think I was thinkin'. I was just acting on impulse." However, he also acknowledged that his thought process at the time included "[s]hooting her." He claimed he "didn't want to kill her," but he acknowledged there was "a likelihood" of that happening.

At the end of the interview, defendant wrote a letter to Munoz's family, apologizing and noting that he "wasn't [him]self at all due to drinking" on the night of the shooting.

C. Gang Expert Testimony

Michael Whittington, a gang investigator for the Santa Clara County District Attorney's Office, testified as the prosecution's gang expert. He discussed gang terms

and activities such as being "jumped in" to a gang and "putting in work" (doing crimes) for a gang. He explained that respect is synonymous with fear in gang culture, and that it is the "most important element" of gang life. He explained that violence benefits a gang because it ensures that community members and gang rivals will leave the gang alone and not report gang crimes. He described the signs and symbols of the Norteño and Sureño gangs and the history of the El Hoyo Palmas gang.

Investigator Whittington testified that in his opinion, the primary activities of the El Hoyo Palmas gang were "[t]he carrying of illegal firearms in public, concealed on their person, murder, assault with a deadly weapon, robbery." He discussed three predicate offenses (see § 186.22, subd. (e)). First, on June 24, 2009, four El Hoyo Palmas gang members were contacted by police and found to be in possession of two firearms. Second, on May 31, 2009, an El Hoyo Palmas gang member challenged the victim by calling him a "Scrapa," held a knife to the victim's throat, and stabbed the victim. Third, on May 21, 2008, two El Hoyo Palmas gang members confronted some Sureño gang members, and one of the El Hoyo Palmas gang members shot two of the Sureños.

Investigator Whittington believed defendant was a member of the El Hoyo Palmas gang. Defendant had been the victim of a stabbing and had testified in the stabber's case, admitting his membership in the El Hoyo Palmas gang. Defendant also had gang-related tattoos and had been associating with El Hoyo Palmas gang members at the time of the shooting and on other occasions.

Given a hypothetical mirroring the facts of the Munoz shooting, Investigator Whittington opined that such a shooting would have been committed for the benefit of a criminal street gang because it involved "disrespect" being "met with violence." Gang members are expected to defend fellow gang members who are being subjected to aggression, and the shooting would show that the shooter was "willing to do violence on behalf of the gang." The crime would also be considered "putting in work" for the gang.

Also, calling out the name of a rival gang after the shooting would benefit the shooter's gang by giving the rival gang a negative connotation. The shooting would also be committed in association with a criminal street gang, since another gang member was involved.

D. Defense Case

Jeremiah Garrido, a criminalist from the Santa Clara County Crime Laboratory, analyzed Munoz's fingernail scrapings for DNA and identified an unknown male as a minor contributor. Defendant was excluded as a possible contributor to the minor DNA.

Defendant testified that he was 17 years old in February 2010. He admitted he was in the El Hoyo Palmas gang. He became a gang member about a year earlier, because all his childhood friends were in that gang.

Defendant had previously admitted to robbery and grand theft charges in juvenile court. He had committed those crimes with other gang members.

Defendant and his family had entered the Witness Relocation Program after he was stabbed for cooperating with the police regarding Garcia's death. That program required that he cooperate with law enforcement and tell the truth when speaking to law enforcement; failure to do so would result in being "kicked out of the program." Defendant believed that if he was kicked out of the program, he would "get probably killed," and his family would get hurt.

Defendant denied shooting Munoz. On the night of the shooting, he had gone to a house party with other members of the El Hoyo Palmas gang. At the party, he was drinking liquor. He left the party with a group of people and went to the home of Michael Trujillo. The group stood in front of the house, talking, when two girls walked by. Garcia and Fruitas said something to the girls. The girls kept walking, with Garcia and Fruitas following them. Defendant and a few others went along, and they all ended up at the taqueria, where Garcia and Fruitas continued to talk to the girls.

Defendant could tell that the conversation was not going well and that the girls were getting mad or excited. Antuna then walked over and tried to intervene. Munoz said something to Antuna, who then shot her and called out "Sur trece" as the group ran away. When defendant got home, he told his mother that "something crazy" had just happened. He was "freaked out."

When defendant talked with the investigators, he initially failed to implicate Antuna, who he considered a friend. He decided to "blame the dead guy," Garcia. He named Antuna after the investigators said they did not believe him. He then blamed himself because he thought the investigators still did not believe him, and that he would be terminated from the Witness Relocation Program if they thought he was not telling the truth. In the subsequent calls he made to his family, he wanted to sound "believable" in case the investigators asked his family members questions.

E. Convictions and Sentence

As previously noted, a jury convicted defendant of first degree murder (§ 187, subd. (a)) and found true an allegation that he personally and intentionally discharged a firearm and proximately caused Munoz's death (§ 12022.53, subds. (b), (c), & (d)) and an allegation that he committed the murder for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)(5)). The trial court sentenced defendant to an indeterminate term of 25 years to life for the murder with a consecutive indeterminate term of 25 years to life for the section 12022.53, subdivision (d) allegation.

III. DISCUSSION

A. Instruction on Fabrication of Evidence

Defendant contends the trial court erred by giving an instruction on fabrication of evidence, because there was no substantial evidence that he attempted to fabricate evidence. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 ["It is error to give an instruction which, while correctly stating a principle of law, has no application to the

facts of the case"].) Defendant asserts there was no evidence he asked someone to lie for him, as the defendant did in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1139, nor any evidence "that he created any kind of false physical evidence."

The challenged instruction—CALCRIM No. 371—provided as follows: "If the Defendant tried to create false evidence, that conduct may show that he was aware of his guilt. If you conclude that the Defendant made such an attempt, it's up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

Anticipating the Attorney General's argument that he forfeited this claim by failing to object, defendant asserts that he may raise the claim on appeal because it affected his substantial rights. (See § 1259 [an appellate court may "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Cage* (2015) 62 Cal.4th 256, 285 [addressing challenges to flight instruction despite lack of objection].) Alternatively, defendant contends his trial counsel was ineffective for failing to lodge an objection to the instruction.

Whether we review defendant's claim of instructional error under section 1259 or under the rubric of his claim of ineffective assistance of counsel, we must determine whether any error was prejudicial. (See *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087; *Strickland v. Washington* (1984) 466 U.S. 668, 695, 697 (*Strickland*).) Thus, even if we assume the instruction was not supported by substantial evidence, we would need to determine whether there is a reasonable probability that the result of defendant's trial would have been different had the trial court not given an instruction on fabrication of evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Strickland, supra,* at p. 695.)

As the Attorney General points out, a number of factors show that defendant was not prejudiced by the instruction on fabrication of evidence. First, the challenged

instruction was not mentioned during closing arguments, and the prosecutor did not argue that defendant fabricated evidence or that the jury should infer his guilt on that basis. Second, the challenged instruction makes it clear that the jury was to determine "[i]f" defendant tried to fabricate evidence; the instruction did not suggest that there was evidence defendant did, in fact, try to fabricate evidence. Third, the jury was instructed that "[s]ome of the[] instructions may not apply" and that jurors should not "assume" that by giving a particular instruction, the trial court was "suggesting anything about the facts or evidence in this case." (See CALCRIM No. 200) Fourth, the evidence that defendant committed the shooting was very strong. Acuna identified defendant as looking like the shooter, and defendant admitted being the shooter during two police interviews. He also indicated his responsibility for the shooting during phone calls to family members. No reasonable jury could find credible defendant's testimony about making false admissions during those interviews in order to stay in the Witness Relocation Program. (See *People v. Houston* (2005) 130 Cal.App.4th 279, 298.)

In sum, on this record, there is no reasonable probability that the result of defendant's trial would have been different had the trial court not given an instruction on fabrication of evidence. (*Watson, supra,* 46 Cal.2d at p. 836; *Strickland, supra,* at p. 695.) Any error was also harmless beyond a reasonable doubt because the instruction "did not contribute to" defendant's conviction. (*Chapman v. California* (1967) 386 U.S. 18, 24, 26 (*Chapman*).)

B. Failure to Instruct on Involuntary Manslaughter

Defendant contends the trial court erred by failing to instruct on involuntary manslaughter based on unconsciousness due to voluntary intoxication. He contends the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 626.[2]

[2] CALCRIM No. 626 provides: "Voluntary intoxication may cause a person to be unconscious of his or her actions. A very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. . . . That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present . . . ." ' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed. [Citations.]" (*Id.* at p. 162.)

"When a person renders himself or herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter. . . . Unconsciousness for this purpose need not mean that the actor lies still and unresponsive: section 26 describes as '[in]capable of committing crimes . . . [¶] . . . [¶] . . . [p]ersons who *committed the act* . . . without being conscious thereof.' (Italics added.) Thus unconsciousness ' "can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting." ' [Citations.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 423-424.)

---

actions. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] When a person voluntarily causes his or her own intoxication to the point of unconsciousness, the person assumes the risk that while unconscious he or she will commit acts inherently dangerous to human life. If someone dies as a result of the actions of a person who was unconscious due to voluntary intoxication, then the killing is involuntary manslaughter. Involuntary manslaughter has been proved if you find beyond a reasonable doubt that: [¶] 1. The defendant killed without legal justification or excuse; [¶] 2. The defendant did not act with the intent to kill; [¶] 3. The defendant did not act with a conscious disregard for human life; [¶] AND [¶] 4. As a result of voluntary intoxication, the defendant was not conscious of (his/her) actions or the nature of those actions. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not unconscious. If the People have not met this burden, you must find the defendant not guilty of (murder/ [or] voluntary manslaughter)."

According to defendant, his statements to police provided substantial evidence of his unconsciousness due to voluntary intoxication. He notes that he told the investigators that he had been "really drunk" at the time of the shooting; that he drank "shot after shot" and was "out of my mind drunk;" that he had "kinda like blacked out;" and that he did not remember what he was thinking and was "acting on impulse."

Defendant relies on two cases finding that instructions on unconsciousness should have been given, although neither case involved evidence of voluntary intoxication. In the first case, *People v. Moore* (1970) 5 Cal.App.3d 486 (*Moore*) the court concluded that an instruction on unconsciousness should have been given, sua sponte, where the defendant had multiple commitments to mental hospitals prior to the shooting, and an expert testified that the defendant was in a " 'schizophrenic fugue state' " when he shot the victim and that "his acts were 'an automatic reaction without consideration.' " (*Id.* at p. 492.) In the second case, *People v. Bridgehouse* (1956) 47 Cal.2d 406 (*Bridgehouse*)[3] the defendant had requested an unconsciousness instruction based on evidence showing that he had suffered "a great shock" upon seeing the victim (*id.* at p. 413) and his testimony that he shot the victim while in "a haze of mental void" (*id.* at p. 410).

Neither *Moore* nor *Bridgehouse* are similar to the instant case. Here there was no expert testimony supporting an unconsciousness finding and no evidence that defendant was in a mental state akin to "a haze of mental void." (*Bridgehouse, supra*, 47 Cal.2d at p. 410.) The evidence instead shows that defendant was able to remember numerous details of the shooting, including what Munoz was wearing, what he was wearing, who was present, where he carried the gun, and what Munoz said just before he shot her. Defendant also gave various reasons for the shooting that conflicted with a finding of unconsciousness, saying he shot Munoz because he was "trying to prove [him]self to everybody" and because he felt that he "wasn't accepted enough by the gang." In

[3] *Bridgehouse* was abrogated on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101, 110.

addition, defendant was able to think strategically immediately after the shooting: he shouted the slogan of a rival gang in order to not get caught. On this record, substantial evidence supports the trial court's implied finding that defendant "did not lack awareness of his actions during the course of the offenses." (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 418 (*Halvorsen*).)

Any error in failing to instruct on involuntary manslaughter based on unconsciousness due to voluntary intoxication was also harmless, whether analyzed under *Watson* or *Chapman*. (See *People v. Beltran* (2013) 56 Cal.4th 935, 955 [in noncapital cases, *Watson* provides the standard of prejudice for a trial court's failure to give sua sponte instructions on lesser included offenses supported by the evidence]; cf. *People v. Thomas* (2013) 218 Cal.App.4th 630, 644 ["Failure to instruct the jury on heat of passion to negate malice is federal constitutional error requiring analysis for prejudice under *Chapman*."].)

First, " 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' " (*People v. Berry* (1976) 18 Cal.3d 509, 518.) The trial court instructed the jury that defendant's voluntary intoxication could be considered in determining whether defendant acted with an intent to kill and in determining whether he acted with deliberation and premeditation. (See CALCRIM No. 625.)[4] Thus, the jury had the opportunity to find that defendant did not have the mental states required for first degree murder as a result of voluntary intoxication, but the jury did not make such findings. (See *People v. Boyer* (2006)

[4] As given, the instruction provided: "You may consider evidence, if any, of the defendant's []voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

38 Cal.4th 412, 475 [any error in instruction on intent required for involuntary manslaughter was harmless where jury was given "with multiple opportunities to absolve defendant of crimes involving specific intent . . . on the basis of his impaired mental state produced by voluntary intoxication"]; *People v. Rogers* (2006) 39 Cal.4th 826, 884 [failure to instruct on involuntary manslaughter was harmless where jury convicted defendant of first degree premeditated murder despite instructions on lesser included offenses that required "higher degrees of culpability" than involuntary manslaughter]; cf. *People v. Ramirez* (2010) 189 Cal.App.4th 1483, 1488 [conviction of first degree murder does not show jury necessarily rejected a finding that defendant acted in heat of passion].)

Second, as noted above, the evidence did not support a finding that defendant was legally unconscious at the time of the shooting. Defendant was able to remember numerous details of the shooting, and his stated reasons for the shooting conflicted with a finding of unconsciousness. The evidence did not show that defendant lacked "awareness of his actions" at the time of the shooting. (See *Halvorsen, supra,* 42 Cal.4th at p. 418.) Rather, the evidence showed that defendant engaged in "purposive" conduct in responding to Munoz's perceived disrespect by shooting at Munoz multiple times and then referencing the slogan of a rival gang in order to not get caught. (See *ibid*.)

In light of the instructions and evidence in this case, there is no reasonable probability that the result of defendant's trial would have been different had the trial court given an instruction on involuntary manslaughter due to voluntary intoxication. (*Watson, supra,* 46 Cal.2d at p. 836.) Any error was also harmless beyond a reasonable doubt because the trial court's failure to give an instruction on involuntary manslaughter due to voluntary intoxication "did not contribute to" defendant's first degree murder conviction. (*Chapman, supra,* 386 U.S. at p. 26.)

C. Motive Instruction – Gang Allegation

Defendant contends the trial court erred by failing to instruct the jury that the motive instruction—CALCRIM No. 370—did not apply to the gang allegation (§ 186.22, subd. (b)(5)). Defendant claims that "motive is one of the elements of the [gang] allegation" and thus the trial court should either have "refrained from instructing the jury with CALCRIM [No.] 370 altogether" or "inserted language excluding the gang enhancement from its purview."

As given, CALCRIM No. 370 provided as follows: "The People are not required to prove that the Defendant had a motive to commit any of the crimes charged. In reaching your verdict, you may, however, consider whether the Defendant had a motive. Having a motive may be a factor tending to show the Defendant is guilty. Not having a motive may be a factor tending to show the Defendant is not guilty."

CALCRIM No. 1401, the jury instruction on the gang allegation, told the jury that in order to find the allegation true, the jury had to find beyond a reasonable doubt that defendant committed the crime "for the benefit of, or in association with a criminal street gang" and that he "intended to assist, further, or promote criminal conduct by gang members."

Defendant acknowledges that the argument he is making was rejected in *People v. Fuentes* (2009) 171 Cal.App.4th 1133 (*Fuentes*). (See also *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1364.) The *Fuentes* court disagreed with the premise that "[a]n intent to further criminal gang activity" is a motive rather than a type of specific intent. (*Fuentes, supra,* at p. 1139.) That court distinguished "the common-sense concept of a motive," i.e., "[a]ny reason for doing something" (*id.* at p. 1140), from "a 'motive' " in legal terms (*id.* at p. 1139), and noted, "We do not call a premeditated murderer's intent to kill a 'motive,' though his action is motivated by a desire to cause the victim's death." (*Ibid.*) Our Supreme Court has also explained that "[m]otive describes the reason a person chooses to commit a crime," which "is different from a required mental state such

as intent or malice." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504 (*Hillhouse*); see also *People v. Cash* (2002) 28 Cal.4th 703, 739 [not error to give motive instruction where defendant was charged with a robbery-murder special circumstance].)

The *Fuentes* and *Hillhouse* courts both distinguished *People v. Maurer* (1995) 32 Cal.App.4th 1121 (*Maurer*), on which defendant also relies. (*Fuentes, supra,* 171 Cal.App.4th at p. 1140; *Hillhouse, supra,* 27 Cal.4th at p. 504.) In *Maurer,* the court considered whether it was error to give the standard motive instruction in a prosecution for multiple counts of annoying a child in violation of section 647.6. The court noted that "the offense of section 647.6 is a strange beast" (*Maurer, supra,* at p. 1126), in that it requires the prosecution to "show that the acts or conduct 'were motivated by an unnatural or abnormal sexual interest' " (*id.* at p. 1127). Because the jury had been told both that such a motivation was required but also that motive was not an element of the crime, the court concluded that jurors were likely to be confused and thus that the trial court had erred by not excluding the section 647.6 offenses from the motive instruction, CALJIC No. 2.51. (*Maurer, supra,* at p. 1127.)

The instant case does not involve an alleged violation of section 647.6 but a gang enhancement. We agree with *Fuentes* that motive is not an element of section 186.22, subdivision (b), and we find *Maurer* distinguishable. We conclude the trial court did not err by instructing the jury with CALCRIM No. 370.

D. Proposition 57

Defendant contends that the judgment must be conditionally reversed and remanded to the juvenile court for a transfer hearing in accordance with Proposition 57, the Public Safety and Rehabilitation Act of 2016.

As defendant points out, he was 17 years old at the time of the shooting but he was charged as an adult under former Welfare and Institutions Code section 707, subdivision (d)(1), which permitted "direct filing," in criminal court, of charges against minors who were "both 16 years of age or older and accused of committing certain

specified offenses (including murder). [Citations.]" (*People v. Mendoza* (2017) 10 Cal.App.5th 327, 343 (*Mendoza*), review granted July 12, 2017, S241647.) But Proposition 57, which was approved and took effect after defendant's trial, "amended the Welfare and Institutions Code to mandate that any allegation of criminal conduct against any person under 18 years of age be commenced in juvenile court, regardless of the age of the juvenile or the severity of the offense. [Citation.] As amended by Proposition 57, Welfare and Institutions Code section 707, subdivision (a)(1) now specifies that the sole mechanism by which a minor can be prosecuted in adult court is through a motion by a prosecutor to transfer the case from juvenile court to adult court." (*Mendoza*, *supra*, at p. 343, fn. omitted.)

Defendant contends that he is entitled to relief under Proposition 57 because his case was "on appeal when Proposition 57 was enacted." He specifically argues: (1) Proposition 57 effected a "reduction in punishment," thus warranting retroactive application pursuant to the principles of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*); (2) principles of statutory construction show that the voters intended to apply Proposition 57 to non-final cases; (3) under the "rule of lenity," Proposition 57 must be interpreted as applying to cases pending on direct appeal; and (4) due process and equal protection require he be provided with a transfer hearing.

This court rejected most of the above arguments in *Mendoza*, *supra*, 10 Cal.App.5th 327. This court concluded that "the *Estrada* rule does not apply" to Proposition 57 and that the voters did not clearly signal an intent to make Proposition 57 retroactive, such that we were required to follow section 3's mandate that the initiative be applied prospectively. (*Id.* at pp. 345, 349.) This court also held that the defendant's equal protection claim failed because "there is a rational basis for prospective-only application of Proposition 57" (*id.* at p. 352), and that applying Proposition 57 prospectively would not violate the defendant's due process rights (*id.* at pp. 353-354).

The only argument this court did not address was defendant's assertion regarding the rule of lenity. As defendant notes, the rule of lenity " 'generally requires that "ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation." ' " (*People v. Nuckles* (2013) 56 Cal.4th 601, 611 (*Nuckles*).) In *Mendoza*, this court found Proposition 57 was "arguably ambiguous" as to whether it applied to cases that were not yet final. (*Mendoza, supra,* 10 Cal.App.5th at p. 345.) This court did not, however, find that there were " ' " 'two reasonable interpretations of the statute stand[ing] in relative equipoise,' " nor that there was an " ' " '*egregious* ambiguity and uncertainty to justify invoking the rule.' " [Citation.]' [Citation.]" (*Nuckles, supra,* at p. 611.) Moreover, resolving any doubt in favor of defendant with the rule of lenity would run counter to section 3's default rule that " ' " 'a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.' " [Citations.]" (*People v. Brown* (2012) 54 Cal.4th 314, 320.)

In sum, we conclude that Proposition 57 does not apply retroactively and thus that defendant is not entitled to conditional reversal and remand for a transfer hearing.

E. Cruel and Unusual Punishment

Defendant contends that his sentence of 50 years to life constitutes cruel and unusual punishment under the Eighth Amendment to the federal Constitution.

Defendant acknowledges that under section 3051, he will have a youth offender parole hearing offering him the possibility of release after 25 years of imprisonment (§ 3051, subd. (b)(3)) and that at such a hearing, the Board of Parole Hearings must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity" (§ 4801, subd. (c)). He also acknowledges that in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), our Supreme Court found that these statutes mooted a juvenile defendant's Eighth Amendment claims, and that this court is bound by *Franklin* (see *Auto Equity*

Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455), but he indicates he is raising this challenge primarily to preserve it for federal review.

We follow *Franklin* in concluding that defendant cannot establish an Eighth Amendment violation. However, we agree with defendant's alternative claim: that he is entitled to a limited remand, as was ordered in *Franklin*. In *Franklin,* the court explained that the new statutory parole scheme for youthful offenders "contemplate[s] that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration." (*Franklin, supra*, 63 Cal.4th at p. 283.) The court noted that section 3051, subdivision (f)(2) provides that " '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board' " and that "[a]ssembling such statements . . . is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Franklin, supra*, at pp. 283-284.) The court found it was "not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Id.* at p. 284.) Thus, the court remanded the matter to the trial court "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*) The *Franklin* court specified that if the trial court later determined "that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence." (*Ibid.*)

A number of cases have followed *Franklin* in concluding that a limited remand was appropriate for a youthful offender whose sentencing hearing predated the enactment

of section 3051 or the 2015 amendment to that section (Stats. 2015, ch. 471, § 1), which extended its application to offenders who were under 23 years of age at the time of their controlling offense. (E.g., *People v. Jones* (2017) 7 Cal.App.5th 787, 819; *People v. Garrett* (2017) 7 Cal.App.5th 871, 884-885; *People v. Scott* (2016) 3 Cal.App.5th 1265, 1283; *People v. Perez* (2016) 3 Cal.App.5th 612, 619.)

The Attorney General agrees that a limited remand is appropriate in this case. Thus, we will order a limited remand in order for the trial court to determine whether defendant had an adequate opportunity to make an accurate record of his circumstances and characteristics at the time of his offense, in anticipation of a future youth offender parole hearing.

IV. DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of determining whether defendant was afforded an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings in a future parole eligibility hearing held pursuant to Penal Code section 3051, and, if not, to allow defendant and the People an adequate opportunity to make such a record.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
MIHARA, J.